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IN THE

Supreme Court of the United States

OCTOBER TERM 1963

No. 1109

J. E. LaVALLEE and ROBERT E. MURPHY,

Petitioners,

against

RAYMOND DUROCHER, JAMES JESSE BROWN and WILLIAM H. MOORE,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the consolidated appeals entitled *United States ex rel. Raymond Durocher* v. *LaVallee*, *United States ex rel. James Jesse Brown* v. *Murphy*, and *United States ex rel. William H. Moore* v. *Murphy* on March 26, 1964.

Citations to Opinions Below

The memorandum opinion of the United States District Court for the Northern District of New York dismissing respondent Brown's application for a writ of habeas

corpus, after a hearing, is printed in Appendix A hereto, *infra* p. 8, and is reported at 212 F. Supp. 926. The memorandum opinion of the United States District Court for the Northern District of New York dismissing respondent Durocher's application for a writ of habeas corpus, after a hearing, is unreported and is printed in Appendix A hereto, *infra* p. 13. The memorandum opinions of the United States District Court for the Northern District of New York denying respondent Moore's applications for writs of habeas corpus, without a hearing, are unreported and are printed in Appendix A hereto, *infra* p. 18. The opinion of the United States Court of Appeals for the Second Circuit, reversing each of the District Court decisions and remanding the cases for further proceedings, is printed in Appendix A hereto, *infra* p. 21, and is not officially reported as yet.

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit sitting *in banc* was entered on March 26, 1964 (R. 108-116). In an order dated April 15, 1964 the mandate of that Court was stayed pending the determination of the within application (R. 125; p. 49 *infra*).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

Questions Presented

Whether this Court's recent ruling in *Gideon* v. *Wainwright*, 372 U. S. 335 (1963), to the effect that indigent defendants are entitled to the appointment of counsel in felony proceedings, must be applied retrospectively so as to vitiate convictions which had become final years prior to the overruling decision and which had complied with the due process clause as then interpreted by this Court.

Statement

Respondents are incarcerated in New York State having been sentenced as multiple felony offenders pursuant to New York Penal Law, § 1941. In attacking the prior out-of-state conviction upon which increased punishment as a multiple offender had been predicated, each respondent claimed upon federal habeas corpus in the District Court that he had been deprived of the assistance of court appointed counsel in the prior conviction and that such prior conviction was violative of due process.

Respondent Durocher is presently confined in Clinton State Prison, Dannemora, New York having been convicted in New York State of the crimes of burglary in the third degree and grand larceny in the second degree. He was sentenced as a second felony offender in May, 1959 to concurrent terms of 5 to 10 years and 2½ to 5 years imprisonment. In dismissing the writ of habeas corpus *after a hearing* the District Court noted that Durocher's prior 1959 conviction in the State of Massachusetts for the crime of breaking and entering with intent to commit larceny was not lacking in fundamental fairness".

Respondent Brown, a prisoner now confined at Auburn State Prison, Auburn, New York had been convicted in New York State of the crime of grand larceny in the second degree and was sentenced on June 24, 1958 by the Suffolk County Court to a term having a minimum of 5 years and a maximum of 10 years in state prison. In dismissing the contention *after a hearing* that Brown's Florida conviction for "escape" in 1954 deprived him of a constitutionally protected right, the District Court noted that "petitioner voluntarily pleaded in Florida to charges that he well understood, from previous criminal experience; that he was treated fairly; that his sentence was lenient and that he was not misled and under his own testimony he was not constitutionally deprived of counsel as the law now stands."

Respondent Moore, a state prisoner also in the custody of the warden of Auburn Prison was convicted in New York State of the crime of manslaughter and was sentenced on April 18, 1952, as a second felony offender, to a term having a minimum of 12 years, six months, and a maximum of 25 years imprisonment. The District Court denied Moore's applications for writs of habeas corpus, without a hearing, noting that the allegations contained in the petitions to the effect that a prior Maryland conviction for attempted robbery in 1943 violated a federally protected right were "vague" and failed to establish a denial of fundamental fairness.

The Court of Appeals* without inquiring as to whether or not respondents' prior felony convictions were lacking in "fundamental fairness", gave retrospective effect to this Court's ruling in *Gideon v. Wainwright*, 372 U. S. 335 (1963), and reversed the orders of the District Court. Hearings were ordered to determine whether respondents had waived their right to counsel.

Reasons for Granting the Writ

The decision below should be reviewed and reversed because it erroneously applies the principle enunciated by this Court in the *Gideon* case retrospectively. We submit that the decision of the Court of Appeals results, as is noted in the dissenting opinion, in a denial of due process to the state. In any event, it can scarcely be disputed that resolution by this Court of the question as to whether or not an overruling constitutional decision such as *Gideon* should be applied so as to vitiate convictions which, when obtained, were in conformity with the due process clause as then interpreted by this Court, is vital to the administration of criminal justice by the states.

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* Judge KAUFMAN wrote the majority opinion in which Judges WATERMAN, SMITH, HAYS and MARSHALL concurred. Judge FRIENDLY concurred in a separate opinion. Chief Judge LUMBARD dissented in an opinion concurred in by Judge MOORE.

Twenty-one years prior to the *Gideon* decision, this Court, in *Betts* v. *Brady*, 316 U. S. 455 (1942), had held that absence of counsel did not *per se* infringe upon the rights protected by the Fourteenth Amendment. During that 21-year period the question of "fundamental fairness" was determined by reference to such factors as the age and education of the defendant, the conduct of the Court or the prosecuting officials and the complexity of the offense charged. During that same period of time the *Betts* principle continued to be allowed and applied in numerous decisions. See e.g., *Carter* v. *Illinois*, 329 U. S. 173 (1946); *Foster* v. *Illinois*, 322 U. S. 134 (1947); *Gayes* v. *New York*, 332 U. S. 145 (1947); *Gryger* v. *Burke*, 334 U. S. 728 (1948); *Bute* v. *Illinois*, 333 U. S. 640 (1948); *Quicksall* v. *Michigan*, 339 U. S. 660 (1950). Significantly, the conviction of respondent Moore was obtained one year after the *Betts* decision and the conviction of Durocher was obtained the same year as this Court's decision in *Quicksall* v. *Michigan*, *supra*. In the latter case this Court held that a defendant who had pleaded guilty to the crime of murder in the first degree and had been sentenced to life imprisonment suffered no constitutional deprivation by virtue of his not being represented by counsel. Mr. Justice FRANKFURTER observed that under the facts there presented, the construction sought by Quicksall would "stultify the due process clause." *Id.* at page 666.

Though the majority of the Court below was of the opinion that this Court's summary disposition, without argument, in *Doughty* v. *Maxwell*, 376 U. S. 202 (1964), mandated unlimited retrospective application of *Gideon*, Chief Judge LUMBARD, in his dissent, did not so find. Indeed, neither Doughty's petition for certiorari nor the State of Ohio's brief in opposition thereto squarely posed the retrospectivity question for review. A reading of the State of Ohio's brief together with the State Court's opinion in *Doughty* v. *Sacks*, 175 Ohio St. 46, 191 N. E. 2d 727 (1963), indicates a concern with waiver rather than a concern with whether or not *Gideon* should be applied prospec-

tively. Unless this Court's summary reversal in *Doughty* is to be considered dispositive of the issue discussed in the extensive opinions of the Court of Appeals and tendered by this application, we urge that the view that *Gideon* should be prospectively applied has substantial merit. That an overruling decision could be limited to prospective application was recognized by the majority as well as by the dissent in the Court below (*infra*, pp. 38, 48) and has been expressed in such cases as *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U. S. 371, 374 (1940); *Great Northern R. Co. v. Sunburst Oil & Refining Co.*, 287 U. S. 358, 363, 366; *Griffin v. Illinois*, 351 U. S. 12, 26 (FRANKFURTER, J. concurring).

For at least the past 30 years, the great majority of courts faced with the question of whether or not an overruling decision was required to be applied retrospectively have rejected the Blackstonian doctrine advanced by respondents—that an overruled decision was, in actuality, never the law—and have proceeded instead on the realistic basis that a party has the right to rely on a decision as long as it stands unreversed, *see, e.g.*, Snyder, *Retrospective Operation of Overruling Decisions*, 35 Ill. L. Rev. 121 (1940); Levy, *Realist Jurisprudence and Prospective Overruling*, 109 U. Pa. L. Rev. 1 (1960); Bender, *The Retroactive Effect of an Overruling Constitutional Decision—Mapp v. Ohio*, 110 U. Pa. L. Rev. 650 (1962); *United States ex rel. Linkletter v. Walker*, 323 F. 2d 11 (5th Cir., 1963); *Reynolds v. United States*, 324 F. 2d 371 (5th Cir., 1963); *Gaitan v. United States*, 317 F. 2d 494 (10th Cir., 1963); *Durham v. United States*, 214 F. 2d 862, 874 (D. C. Cir., 1954); *Shioutakon v. District of Columbia*, 236 F. 2d 666, 670 (D. C. Cir., 1956); *Dooling v. Overholser*, 243 F. 2d 825, 829 (D. C. Cir., 1957); *Collins v. Webb*, 133 F. Supp. 877 (N. D. Cal., 1955); *Kogis v. Doctors Hospital*, 12 Mich. 2d 367, 107 N. W. 2d 292 (1961); *Molitor v. Kaneland Community Unit District No. 302*, 18 Ill. 2d 11, 163 N. E. 2d 89, 97 (1959); *State v. Martin*, 384 P. 2d 833 (Wash., 1963); *Coffey v. Anderson*, 371 S. W. 2d 624, 626 (Ky., 1963); *Smith v. Crouse*, 386 P. 2d 295, 300-301 (Kan., 1963).

Settlement by this Court of the question as to the scope of *Gideon's* application is plainly in the public interest. As Chief Judge LUMBARD noted in his dissent, retrospective application "compels the release of thousands* of felons who could no longer be tried because witnesses and evidence are no longer available" (*infra*, p. 46). In sum, as the majority itself was aware, the judgment sought to be reviewed results in the release of those who "it would be hardest to retry and who in the interest of an ordered society should least be permitted to remain at large" (*infra*, p. 40).

CONCLUSION

For the foregoing reasons this petition for writ of certiorari should be granted.

Dated, New York, May 11, 1964

Respectfully submitted,

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* New York, of course, has always provided for the assistance of counsel for indigent persons charged with crimes. Yet the New York State Department of Correction has estimated that there are upwards of 1,100 felons who are currently incarcerated as multiple felony offenders whose sentences are predicated on prior out of state convictions. While there is no way of estimating how many of these did not have counsel, it is believed to form a substantial number of these persons. Moreover, many of the prior convictions were had so long ago that proof controverting the prisoner's allegations may not be available.

Appendix A

United States ex rel. James Jessie Brown, vs. Hon. Robert E. Murphy, Warden, New York State Prison, Auburn, New York. (Hon. James T. Foley, D. J.)

Memorandum-Decision and Order

This petitioner filed for a writ of habeas corpus directly in this Court under the important ruling of the Court of Appeals, Second Circuit, in U. S. ex rel. LaNear v. LaVallee, 306 F. 2d 417 before the mandate of that Court was filed and final in this District Court. Such premature action is again indication that the state prisoners of New York—and I have observed this fact from continuous contact over a period of years with their problems—have free access to or gain knowledge quickly in some manner of current judicial rulings that may affect their own destiny. The LaNear ruling of the federal Appellate Court of this Circuit, inasmuch as it was not challenged further by the State of New York, is now binding on this Court and I must follow its reasoning, guidance and policy literally and willingly. It is evident to me serious, practical complications now confront New York by a drastic change of policy in this Circuit from past approach in federal habeas corpus procedures relating to exhaustion of available state remedies under the federal staute (28 U.S.C.A. 2254).

It would seem beneficial, in my judgment, for the Attorney General of New York to make certain the decision with important consequence to the state administration of criminal justice is brought to the attention of the judicial Conference of New York, the Commission of New York studying possible revisions in its penal laws and procedures, and the District Attorneys' Association. In my judgment, an unhealthy situation exists that affects federal-state comity in the criminal field that possibly could be prevented or diminished by clarifying legislation or extension of judicial review of multiple offender convictions in

New York. Cautious and careful use by the District Attorneys of New York in the selection of previous convictions under the multiple offender law that may be constitutionally questionable would lessen the probability of immediate federal intrusion and review.

I have no idea of the statistical number of habitual-offender New York convictions that may be under this cloud of direct federal review, but it would seem there must be a considerable number. The constitutionality of the multiple offender laws of New York, long established in its criminal system of justice, has been upheld by the highest court of New York. Section 1941-43 Penal Law, New York; People v. Gowasky, 244 N. Y. 451, 458-460; People ex rel. Fernandez v. Kaiser, Warden, 256 N. Y. 581; cert. den. 284 U. S. 631.) It has been held flatly by the Supreme Court of the United States that the constitutionality of such habitual-offender or recidivist statutes is no longer open to challenge. The only problems remaining constitutionally seem to relate to the State procedures meeting due process requirements when the habitual-offender or recidivist charge is presented to impose a more severe sentence. (Oyler v. Boles, 368 U. S. 448; see also Gayes v. New York, 332 U. S. 145.)

In the matter at hand, the petition contained sufficient allegations to warrant the issuance of a writ of habeas corpus, and such was done. The petitioner was brought to the City of Albany during a busy and regularly scheduled trial term of this Court in his prison gray by prison guards from Auburn Prison, Auburn, New York, approximately 175 miles from Albany. Previously I had assigned an attorney in Albany, New York, with whom the petitioner acknowledged at the hearing he was satisfied and had had sufficient time to correspond and discuss his matter. As I am most certain will happen in most of these situations, the petitioner was the only witness. New York filed a formal Return to the Writ, mostly legal in

its content, and after the hearing forwarded a letter dated December 14, 1962 from Judge MacMillan of the Criminal Court of Record, Palm Beach, Florida. According to the letter, Judge MacMillan had discussed the matter with the now Senior Circuit Judge, Judge White, who had no independent recollection of sentencing the petitioner in 1954, but set forth his custom in sentencing procedures. The letter also informs that the files of the Assistant Solicitor had been destroyed in 1957. The letter stated that the Judge was told by the Assistant Solicitor who prosecuted the petitioner that he had no independent recollection of the matter, but that it was never his policy when acting in his official capacity to suggest to a defendant to plead guilty. The letter, of course, is of doubtful competence in a judicial proceeding, but I shall file it for what it is worth and to point up the extreme burden and disadvantage New York will have to meet these challenges. The Court minutes accompanying the letter expressly state that Walter Lee Corbitt, the true name of the petitioner, pleaded guilty August 15, 1954 to Escaping Prison and Breaking and Entering to Commit Petit Larceny, and was sentenced to one year at hard labor concurrent on each count. The minutes set forth a state trial procedure unknown to me indicating that after the plea there was a State witness, a deputy Sheriff, and that defendant testified in his own behalf, and then was adjudged guilty and sentenced.

This lack of knowledge on my part of Florida criminal procedures points up the serious disadvantage and hardship for the district judge trained in New York law to apply the test of fundamental fairness that is determinative at the present time of constitutional deprivation in these lack of counsel situations. Of course, I can read, and I hope interpret reasonably well, the statutes of Florida but that gives no insight or feel of the criminal procedures of a distant state or its Judges that is usually gained by actual

contact and experience. That is the reason Justice Frankfurter stated in his dissenting opinion in Darr v. Burford, 339 U. S. 200, 230, 231, that nothing stands out more prominently in the experience of the Supreme Court of the United States than the doubts and difficulties in ascertaining law controlling local practices and local remedies. And he characterized the approach as a rule of wisdom, often applied by the Court, that questions of local law and local practice will not be decided by the highest court in federal habeas corpus applications but will be submitted to the knowledgeable views of federal judges in the various localities. That is the weakness of untrained, long distance, judicial analysis that must result from initial review of out-state convictions in habeas corpus by the District Court, without the assistance of some review or decision in the foreign state court that possibly may be obtained.

However, to a District Judge with some degree of experience are not a difficult assignment. The petitioner at the hearing, as he admitted that the name "James Jessie Brown, which he sets forth as his name without qualification in the title of his petition, was an alias he assumed when he came to Suffolk County, New York, from Florida. He gave no reason, nor was he asked why he apparently invented the forenames of the famed outlaw in his adopted alias. The petitioner, in his testimony, did not support with credence the material allegations he set forth in his petition. He was hazy about what the Judge asked him before his plea and did not recall whether he inquired about a lawyer or not. I am not inclined to believe his testimony concerning the promises of the Assistant County Solicitor because again it was vague, indefinite and improbable. (See U. S. ex rel. Wissenfeld v. Wilkins, 2 Cir., 281 F. 2d 207.) The petitioner testified he was nineteen years of age with only a third grade education at the time of his plea in August, 1954. However, he admitted that at the time of this escape and burglary involvement he was then serv-

ing one year for breaking and entering, being sentenced in February 1954. I am never sure if precise degree of education is necessary or judicially settled for one to understand simple charges of crime such as here, escaping from prison and burglarizing a house. I do intend to keep my credulity in these proceedings properly balanced and sensible. The petitioner, although it may not be too relevant a factor here, received leniency and fair consideration in New York when sentenced as a second offender on June 24, 1958. He had been indicted for burglary, first degree, and grand larceny, first degree, and his plea was accepted to the crime of grand larceny, second degree, and as a second offender he was sentenced to a term of five to ten years. In answer to my question he admitted he burglarized the home in Suffolk County. As happens often in New York criminal practice under this mandatory sentencing statute, reductions of charges are made and agreed upon to avoid too harsh an impact from the multiple offender sentence. The real grievance of the petitioner, and I so find, is that he was denied parole several months ago.

My findings are that the petitioner voluntarily pleaded in Florida to simple charges that he well understood from previous criminal experience; that he was treated fairly; that his sentence was lenient and he was not misled, and under the totality of circumstances attending the plea and from his own testimony he was not constitutionally deprived of counsel as the law now stands. (Betts v. Brady, Cayndey v. Cochran, Corrections Director, State of Florida, 369 U. S. 506.) Hearing is soon scheduled in the Supreme Court of the United States in Gideon v. Cochran, Cert. Florida Supreme Court, with the point presented to overrule Betts v. Brady, supra. (31 Law Week 3212).

The writ of habeas corpus is discharged and dismissed, and the petition upon which it is based is denied and dismissed.

It is So Ordered.

Dated: Albany, New York, January 8, 1963.

Appendix A.

United States of America ex rel. Raymond Durocher, vs. *J. E. LaVallee*, Warden, Clinton Prison, Dannemora, N. Y. (BRENNAN, Judge).

On July 24, 1962, the application of the above named state court prisoner for a writ of habeas corpus was denied. A four page memo was filed. The burden of the above application consisted of an oblique attack upon petitioner's conviction in a Massachusetts court which was used as the basis of his sentence as a second felony offender in a New York court. He is presently detained under the resulting commitment. The denial was based principally upon the holding that petitioner had failed to show that he had exhausted available remedies in the State of Massachusetts.

About a month later on August 30, 1962, a second petition was submitted, very similar to the previous one, it being apparent that the substance of the decision in U. S. ex rel. LaNear v. LaVallee, 306 F. 2d 417, had come to petitioner's attention. Consideration of same was withheld pending receipt of the judgment in the LaNear case. Later the requested writ was issued, counsel for the petitioner assigned; a hearing held; evidence was received and the problem involved is before the court for decision.

Petitioner's conviction by a plea of guilty to the charge of "breaking and entering in the daytime with the intent to commit larceny and larceny" in the District Court of Hampden County, Massachusetts, on September 19, 1960 was used under New York procedures as the basis of increased punishment in the matter of the sentence imposed as above.

The contentions advanced in the present petition are to the effect that petitioner was not represented by counsel or was advised of his right thereto in the matter of the Massachusetts plea and that his waiver of indictment in that court was ineffective to bar his constitutional right

to be charged by and tried upon an indictment. Petitioner concludes that the proceedings in the above court were in violation of his fundamental rights and the resulting conviction may not be used in New York court. In effect he seeks to be resentenced in the Nassau County Court as a first offender.

The evidence received upon the hearing was comparatively brief and consisted of the oral testimony of the petitioner as to his own background and the facts surrounding the Massachusetts conviction. The respondent offered only documentary evidence relative to the conviction under attack. The facts as disclosed are summarized below.

Petitioner was arrested in August 1950 at Westfield, Massachusetts. He was at the time 17 years of age, in good health and suffered no physical or mental handicap. He had at least a partial seventh grade education, having quit school and run away from home about a year previous. He had had no previous experience with law violations. At the time of his arrest, he was interrogated as to stealing a watch and promptly admitted the fact. He was arraigned before a magistrate the next morning and later removed to a jail at Springfield.

On September 16, 1950, the petitioner signed a written waiver of indictment which contained a request for prompt arraignment on the complaint. The waiver was at the time consented to by the District Attorney and approved by the court on September 18, 1950. On that date, he appeared before the court; a complaint was read to him, charging that he did break and enter the home of an individual with intent to commit larceny and did commit larceny of two watches of the value of $25.00 and $8.00 in money. The petitioner understood the charge and entered his plea of guilty. He was then committed to the Youth Service Board. At no time did petitioner request the services of an attorney and the record is entirely silent as to any statement by the court as to his rights to counsel or as to the nature or effect of a plea.

Appendix A.

To evaluate this record is not a satisfying task. This type of proceeding generally fails to disclose the whole picture of the relevant facts and circumstances. It may be that there is no record of the actual colloquy at the time of arraignment and plea. It may also be true that the State of New York is faced with a serious problem in meeting the mounting number of attacks upon convictions of long standing, in foreign states. However this may be, the burden to meet such attack is imposed upon the State in definite terms by the decision in U. S. ex rel. Savini v. Jackson, 250 F. 2d 349. This court must then take the record as it is and decide the issues guided by authoritative decisions.

Any contention as to the constitutional invalidity of petitioner's Massachusetts conviction by complaint, rather than indictment, is rejected. The same problem has been decided in state court proceedings instituted by the petitioner and it would seem that the petitioner did not fully pursue his appellate remedies from adverse decisions. As a matter of fact, it would appear that petitioner has instituted some sort of state proceeding which was still pending at the time the petition was filed, in this court. Peo. v. Durocher, 17 A. D. 2d 922. This situation is not unusual under our present requirements. Additionally, the constitutionality of the Massachusetts procedure seems to have been upheld by court decision. Whether or not petitioner's waiver here was understandingly made is a part of the decision involving the fundamental fairness of the overall proceeding.

The record here does not present the usual background of decisions wherein the rights of defendants in criminal cases are held to have been infringed upon or denied. Here there is no evidence of mental or physical handicap suffered by petitioner. There is no claim or evidence of coercion or overreaching on the part of the prosecuting authorities. There is no claim of lack of understanding

except that petitioner asserts that he had no knowledge of the elements of the charge as it pertains to "breaking and entering". In substance, petitioner claims that he was prejudiced by lack of counsel because (a) counsel might have been able to prove that the watch was of lesser value than alleged; (b) that counsel might not have waived indictment; and (c) that counsel might have been able to prove that the crime of breaking and entering, as charged, had not been committed. Petitioner frankly admits his entry into the house and the taking of a watch and money from one of the bedrooms. He testifies that the entry was made through an open door but what impediment, if any, he met with, in passing from the kitchen to the upstairs bedroom is not disclosed.

In evaluating the record here, the fact that petitioner was 17 years of age of seventh grade education and an experienced in criminal violations is taken into consideration. No doubt the petitioner at the time of the hearing had matured by some thirteen years and two subsequent felony convictions and he leaves the impression of a natively intelligent young man who must have obtained a measure of wordly knowledge and experience in his seventeen years prior to 1950. We accept the oath of such a man in our courts and upon induction into the armed forces when he pledges to support the constitution. This court is unwilling to find any lack of understanding upon the part of this petitioner which would alert the trial court to the necessity of counsel for his protection in the matter of the conviction involved.

The pertinent principles of law are then to be applied to the above conclusion and the ultimate decision made. It hardly needs citation of authorities to support the principle that the requirement of the Sixth Amendment as to representation by counsel does not apply to non-capital offenses punishable under state law. Gallegos v. Nebraska, 342 U. S. 55; Foster v. Illinois, 332 U. S. 134; U. S. ex rel.

Turpin v. Warden, 190 F. 2d 252. Some vitality must remain in the presumption of regularity which attaches to a conviction in a competent state court. The burden is still upon the petitioner to show that the failure of the trial court to offer counsel to the petitioner was "apt to result in injustice". Uveges v. Penn., 335 U. S. 437; Quicksall v. Michigan, 339 U. S. 660. Petitioner's claims of prejudice here are purely hypothetical. They fall far short of a showing of manifest injustice. Prosecution by complaint, instead of by indictment, does not detract from petitioner's rights. There is no proof that the value of the items stolen could have been reduced from that stated in the information. The contention that petitioner's means of entry into the house was through an open door loses any significance when in any event the admitted larceny would be sufficient to invoke New York procedures relative to increased punishment.

The undersigned admits a confusion or lack of understanding as to how far evidence as to the facts of the crime may be admissible or is to be considered in this type of habeas corpus proceeding. If petitioner's evidence of the details of the violation is to be heard and considered, the state must be prepared to controvert it. A full dress trial in a court which has no jurisdiction to decide the fact of guilt would appear to be the inevitable result. It is hard to understand how we avoid determining guilt if prejudice follows from a showing of innocence. Many reported decisions seem to search the underlying facts of the crime in order to determine the existence of prejudice or unfairness. Our Circuit Court indicates, at least by inference, that such a search not only is proper but is necessary. U. S. ex rel. Easterling v. Wilkins, 303 F. 2d 883 at 885. Generally the petitioner's version appears only to be offered. If the state has the burden of meeting such evidence, then it should be assumed or if the state is unwilling to assume the burden, then a new or closer look should be taken at the so-called multiple offender law. If this deci-

sion is to be appealed, consideration of this question would be of help to this court.

The above will constitute the findings of this court and it concluded that petitioner has failed to establish that his fundamental rights were infringed in the matter of the Massachusetts conviction here involved and that the writ be dismissed and petitioner remanded.

The Clerk will receive and file the petition and accompanying documents without the requirement that fees therefor be prepaid, and it is

SO ORDERED.

/s/ STEPHEN W. BRENNAN,
U. S. District Judge.

United States of America ex rel. William H. Moore vs. *Hon. Robert E. Murphy*, Warden of New York State Prison, Auburn, New York (Foster, Judge)

The petitioner files his fourth handwritten application for a writ of habeas corpus. Chief Judge Brennan first dismissed his application upon the ground of insufficiency and thereafter I denied his petitions upon the same ground with reference also to, as I put it, the hopeful statutory enactment of the Congress on habeas corpus procedures entitled "Finality of Determination". (28 U.S.C.A. § 2244.)

I see nothing important in addition as to an unfair factor in his plea in Maryland that would cause change from my previous decisions. I have expressed my thought that in these applications there must be at least a showing of primary facts that would give some reasonable support to the claim based by law for decision upon the general test of fundamental unfairness. (U. S. ex rel. Bagley v. LaVallee, 209 F. Supp. 529.) To the cases cited therein I add the authority of the United States Supreme Court that a deprivation of the constitutional right of counsel should not readily be inferred from vague allegations. (Tomkins v.

Missouri, 323 U. S. 485, 487, Douglas, J.; see also, U. S. ex rel. Marcial v. Fay, 2 Cir., 247 F. 2d 662, 667.) There is also the caution, in another Supreme Court case, that signifies to me the importance of judicial discernment and care at every stage in this type challenge, that like other judgments a judgment based on a plea of guilty is not, of course, to be lightly impeached in collateral proceedings. (Williams v. Kaiser, 323 U. S. 471, 474, Douglas, J.)

Despite my conclusion, I realize that such appraisal is immersed in great uncertainty and indefiniteness. It may be I am in error and this petitioner, under the current approach in these applications, is entitled to a hearing. Many hearings are now being directed and afforded in this Circuit, particularly because we may be a little gunshy. (U. S. ex rel. Farnsworth v. Murphy, 254 F. 2d 438, remanded for hearing 358 U. S. 48.) Each of these matters is based upon an individual and different set of facts and circumstances. In my view the normal judicial function to discern and evaluate should not be abandoned in order to follow a comfortable pattern of expediency and line of least resistance.

I am firm in my belief of insufficiency here, but this petitioner has been sincere in his persistency, polite and courteous in his correspondence. Although I shall deny the petition again, I do hereby issue a certificate of probable cause to review my denial, and thereby allow him to proceed on appeal to the United States Court of Appeals, Second Circuit, United States Court House, Foley Square, New York City in forma pauperis, to the limited extent that if a notice of appeal is forwarded by the petitioner to the Clerk of this Court at Utica, New York, it shall be filed without the payment of fee.

The petition is denied and dismissed. The present petition shall be filed without the prepayment of fee, and it is So Ordered.

Dated: Albany, New York, February 28, 1963.

Appendix A.

United States ex rel. William H. Moore, vs. Hon. Robert E. Murphy, Warden of Auburn State Prison, Auburn, New York (FOLEY, Judge).

The petitioner files directly with me a third application for a writ of habeas corpus. His complaint is that he did not have counsel when he pleaded guilty in the State of Maryland to the crime of Burglary in 1943 and was sentenced to eighteen months, and that this conviction was used against him in New York to sentence him as a second offender upon his plea of guilty to manslaughter.

Chief Judge Brennan denied similar application by decision dated October, 1962, and I denied his second application by memorandum-decision and order dated December 21, 1962. I returned his previous third application by letter dated January 2, 1963, requesting he file it with the Clerk of the Court at Utica with affidavit that he did not have the means to pay the $5.00 filing fee, and also designate which of the Judges he wished to pass upon it. Now, he simply remails it again to me without any affidavit of indigency.

The petition is insufficient. The only allegation is that he did not have counsel in Maryland, nor was he advised of his right to counsel, and did not know Burglary was a serious charge and a felony.

Petitioner now states he is fifty-four years of age. At the age of thirty-four in Maryland, he was not too immature, although frankly I am not sure of the legal standard for the necessary education to understand the charge of burglary in these situations. My own opinion is that on-the-job training is the best education.

The petition is insufficient and does not make necessary showing of any primary facts to indicate fundamental unfairness. The petition is denied and dismissed, and shall be filed by the Clerk without the payment of fee.

It is So Ordered.

Dated: Albany, New York, January 16, 1963.

Appendix A.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 131, 132, 133, 134-135—September Term, 1963.

(Argued October 11, 1963 Decided March 26, 1964.)

Submitted to the *in banc* court January 6, 1964.

Docket Nos. 28174, 28190, 28243, 28279-28280.

UNITED STATES OF AMERICA *ex rel.*
RAYMOND DUROCHER,

Relator-Appellant,

—v.—

J. E. LAVALLEE, Warden,
Clinton State Prison, Dannemora, N. Y.,

Respondent-Appellee.

UNITED STATES OF AMERICA *ex rel.*
JAMES JESSE BROWN,

Relator-Appellant,

—v.—

ROBERT E. MURPHY, Warden,
Auburn Prison, Auburn, N. Y.,

Respondent-Appellee.

Appendix A.

UNITED STATES OF AMERICA *ex rel.*
MARION RIPPLE,
Relator-Appellant,

—v.—

ROBERT E. MURPHY, Warden,
Auburn Prison, Auburn, N. Y.,
Respondent-Appellee.

UNITED STATES OF AMERICA *ex rel.*
WILLIAM H. MOORE,
Relator-Appellant,

—v.—

ROBERT E. MURPHY, Warden,
Auburn Prison, Auburn, N. Y.,
Respondent-Appellee.

Before:

LUMBARD, *Chief Judge*, and
WATERMAN, MOORE, FRIENDLY, SMITH, KAUFMAN,
HAYS and MARSHALL, *Circuit Judges.*[1]

Appeal from the United States District Court for the Northern District of New York, Stephen W. Brennan and James T. Foley, *Judges.*

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[1] These appeals were originally heard by a panel consisting of Judges Clark, Moore and Kaufman. Waiting for a majority of the panel, Judge Clark had prepared and circulated to the other members of the panel an opinion reversing and remanding the four cases for reconsideration in the light of *Gideon* v. *Wainwright*, 372 U. S. 335 (1963). Judge Clark having died before the opinion was filed, the Court decided *sua sponte* to consider the appeals *in banc*, in view of the significance of the questions here presented.

Appendix A.

Four consolidated appeals from the denials of writs of habeas corpus brought by relators confined in New York state prisons under the state multiple offenders law, claiming that their out-of-state convictions which made them multiple offenders were illegal for lack of counsel under the principle recently enunciated in *Gideon* v. *Wainwright*, 372 U. S. 335. *See United States ex rel. Brown* v. *Murphy*, D. C., N. D. N. Y., 212 F. Supp. 926. Reversed and remanded.

LEON B. POLSKY, The Legal Aid Society, New York City (Anthony F. Marra, The Legal Aid Society, New York City, on the brief), *for relators-appellants.*

RONALD J. OFFENKRANTZ, Deputy Asst. Atty. Gen. of the State of New York, New York City (Louis J. Lefkowitz, Atty. Gen. of the State of New York, Irving Galt, Asst. Sol. Gen., and Mortimer Sattler, Asst. Atty. Gen., New York City, on the brief), *for respondent-appellee* (No. 28174).

RONALD J. OFFENKRANTZ, Deputy Asst. Atty. Gen. of the State of New York, New York City (Louis J. Lefkowitz, Atty. Gen. of the State of New York, Irving Galt, Asst. Sol. Gen., and Stephen N. Rubin, Deputy Asst. Atty. Gen., New York City, on the brief), *for respondent-appellee* (No. 28190).

BARRY MAHONEY, Deputy Asst. Atty. Gen. of the State of New York, New York City (Louis J. Lefkowitz, Atty. Gen. of the State of New York, Irving Galt, Asst. Sol. Gen., New York City, on the brief), *for respondent-appellee* (No. 28243).

Appendix A.

RONALD J. OFFENKRANTZ, Deputy Asst. Atty. Gen. of the State of New York, New York City (Louis J. Lefkowitz, Atty. Gen. of the State of New York, Irving Galt, Asst. Sol. Gen., and Stephen N. Rubin, Deputy Asst. Atty. Gen., New York City, on the brief), *for respondent-appellee* (Nos. 28279-28280).

KAUFMAN, *Circuit Judge*, with whom Judges WATERMAN, SMITH, HAYS and MARSHALL concur:

Claiming that they were not advised of their right to counsel when pleading guilty, four New York prisoners serving increased sentences as second offenders seek to invalidate their first convictions under the due process clause of the Fourteenth Amendment. In District Court opinions which preceded the Supreme Court's decision in *Gideon* v. *Wainwright*, 372 U. S. 335 (1963), all four relators were denied relief on the ground that they had failed to establish that their convictions were lacking in fundamental fairness, as required by *Betts* v. *Brady*, 316 U. S. 455 (1942). On appeal, all claim that the overruling of *Betts* by *Gideon* requires that they be afforded hearings in which an express finding of prejudice would be unnecessary. They argue, in essence, that a criminal conviction cannot stand under *Gideon* if the convicted defendant was at no time apprised of his right to counsel, even in the absence of the sort of "special circumstances" which were long indispensable to relief under *Betts*.

These appeals mark the first occasion upon which this Court has been required to consider the scope and far-reaching implications of the *Gideon* decision. Specifically we must now determine whether *Gideon* compels the offer of counsel to an indigent defendant who has pleaded guilty, and who has not expressly requested the services

of an attorney. Finally, we must decide whether *Gideon* may be invoked by defendants whose convictions preceded that of Clarence Gideon himself.

I.

The relevant facts of the individual cases may be briefly summarized.

1. *Durocher*—Raymond Durocher was convicted in May of 1959, of third-degree burglary and second-degree grand larceny, and was sentenced as a second offender to concurrent terms of 5-10 and 2½-5 years imprisonment.[3] His earlier conviction, used as a predicate for second-offender treatment, was for breaking and entering with intent to commit larceny, and was entered in Massachusetts on a plea of guilty in September of 1950. In his application for a writ of habeas corpus, Durocher alleged that he had been unaware of his right to counsel at the time of his guilty plea, that he had not been offered an attorney, although indigent, and that he had not understood the "legal interpretation" of the charges against him.

At a hearing granted upon his application, it was revealed that Durocher had been seventeen years of age at the time of his Massachusetts conviction, and that he had received a "partial seventh grade education." Testifying below in his own behalf, Durocher asserted that he could

[3] While the sentences which Durocher received as a second offender did not exceed the maximum possible sentences for a first offender, this should in no way affect our result. Neither third-degree burglary nor second-degree grand larceny carries a mandatory minimum sentence for a first offender. N. Y. Penal Law §§ 407 (3rd), 1297. It is possible, therefore, that upon resentencing, Durocher would receive a sentence shorter than the period which he has already served. This possibility is sufficient to warrant the issuance of a federal writ of habeas corpus. *See United States ex rel. Smith* v. *Martin*, 242 F. 2d 701 (2d Cir. 1957); *United States ex rel. Foreman* v. *Kay*, 184 F. Supp. 535 (S. D. N. Y. 1960).

"reed average," but admitted to considerable difficulty with "big words." The hearing further established that the Massachusetts offense had been Durocher's first, and that he had run away from home a year prior to his arrest.

Although finding no indication that Durocher had been advised of his right to counsel, the District Judge denied the petition on the basis of his conclusion that Durocher's conviction was not lacking in fundamental fairness. In so holding, the Judge emphasized that Durocher had understood the nature of the charges against him, and had not requested the assistance of an attorney. He relied heavily, moreover, upon Durocher's admission, at the time of his arrest, to entering a home and stealing several wrist watches; he abruptly dismissed Durocher's contentions that an attorney might have been able to prove that he had not "broken" into the home, as charged in the complaint, but rather had entered through an open door.

2. *28190*—Four years after his Florida conviction for escape from a road gang, James Jesse Brown was convicted in June of 1958 of second-degree grand larceny and was sentenced as a second offender to 5-10 years imprisonment. In his petition, Brown alleged that he had been illiterate at the time of the Florida conviction, and that the Assistant County Solicitor had threatened him with "plenty of time in prison" unless he pleaded guilty to the charges of escape. He further contended that he had "walked away" from the road gang because of the "inhumane conditions" of his imprisonment.

Once again, despite a record which showed that Brown had appeared without counsel at his Florida conviction, the District Judge denied his petition. Rejecting Brown's claim of coercion as "vague, indefinite and implausible," the Judge concluded that "the petitioner voluntarily pleaded in Florida to simple charges that he well understood from previous criminal experience; that he was

treated fairly; that his sentence was lenient and he was not misled, and under his own testimony he was not constitutionally deprived of counsel as the law now stands." The fact that Brown's petition was determined under the test of "fundamental fairness," was emphasized by the Court's citation of *Betts* v. *Brady*, as an indication of where "the law now stands," followed by the notation that *Gideon* was then pending before the Supreme Court.

3. #28279, 28280—Unlike Durocher and Brown, William Moore was never afforded a hearing below. Convicted of manslaughter on April 18, 1952, he was sentenced as a second offender to from 12½ to 25 years; his prior conviction was entered in Maryland, nine years earlier, upon a plea of guilty to attempted burglary. In his petition, he alleged that he had not known of his right to counsel at the time of his plea, and that he was never advised of any such right; he also claimed that he had been unaware of the "seariness" of the Maryland charges, and was never informed that they constituted a felony. His petition was denied, largely on the ground that his allegations were too "vague" to establish a denial of fundamental fairness. In so holding, the District Judge noted that Moore had been thirty-four years of age at the time of the Maryland conviction, and "not too immature" to understand the charges which he faced.

4. #28243—Marion Ripple, the fourth and final appellant, was convicted of first-degree manslaughter in September of 1954, and, as a result of a 1931 Indiana conviction for armed robbery, was sentenced as a second offender to from fifteen to thirty years. Finding that "petitioner was a mature man of thirty-nine years of age [in 1931] and the crime to which he entered a plea of guilty was easily understandable," the District Judge denied Ripple's petition without a hearing.

Appendix A.

Ripple's case differs from that of the other appellants in several significant respects. Alone among the various petitioners, Ripple specifically alleged that he had requested counsel, and that his request had been denied. And in the application which he submitted to the District Judge for a certificate of probable cause, Ripple further maintained that he was "not financially unable to retain counsel," but instead asserted that he was "denied the opportunity to do so." In effect, therefore, Ripple was not claiming a denial of his right to court-appointed counsel, but a denial of the opportunity to secure private counsel of his own choosing.

II.

As the state implicitly concedes, no procedural obstacles bar our consideration of the merits of appellants' contentions. Since all of the second-offender sentences were imposed in New York and since all of the prior convictions were obtained in other states, there is no problem of exhaustion of state remedies. A New York prisoner is not obligated to challenge out-of-state convictions in the courts of the rendering state, and New York provides no procedure whereby these prior convictions may be challenged in the New York courts. *United States ex rel. LaNear* v. *LaVallee*, 306 F. 2d 417 (2d Cir. 1962); see *People* v. *Wilson*, —— N. Y. —— (N. Y. Court of Appeals, December 30, 1963). It is clear, moreover, that a prior conviction may be invalidated upon federal habeas corpus by a prisoner serving an increased sentence under a second-offender statute. *United States ex rel. Easterling* v. *Wilkins*, 303 F. 2d 883 (2d Cir. 1962).

The state has also conceded that Ripple's claim that he was not permitted to secure private counsel, as specifically detailed in his application for a certificate of probable cause, would have been sufficient to require a hearing had these allegations been contained in his original petition for

a writ of habeas corpus. We agree, and we are further of the opinion that it would have been the better course for the District Judge to have considered Ripple's application for a certificate as a new or modified petition for a writ. Cf. *United States* v. *Glass*, 317 F. 2d 200 (4th Cir. 1963). Accordingly, we remand Ripple's case for a hearing on his petition for a writ of habeas corpus as implemented by the more specific allegations contained in his application for a certificate.

We will concern ourselves hereafter, therefore, chiefly with the three remaining appellants. Although these three appellants seem to maintain that their prior convictions were invalid even under the "fundamental fairness" test of *Betts* v. *Brady*, 316 U. S. 455 (1942), their more substantial contentions are based on the premise that such a showing is unnecessary. They argue, in brief, that *Gideon* v. *Wainwright*, 372 U. S. 335 (1963), imposed an absolute requirement that indigent defendants be afforded court-appointed counsel. Absent an express waiver of that right, they insist that the failure of a court to offer the assistance of counsel is sufficient to invalidate a conviction under the due process clause of the Fourteenth Amendment. Each of the three appellants has alleged that he was unrepresented by counsel at the time of his prior conviction, and that he was never afforded the opportunity to secure court-appointed counsel; each has further claimed that he was indigent when he pleaded guilty, and that he did not waive his right to an attorney. If, therefore, *Gideon* is to be retroactively applied to convictions bottomed upon a plea of guilty, we would be compelled to reverse the decisions below and remand for new hearings under the standards of *Gideon* v. *Wainwright*. We now turn to a consideration of these vitally significant questions.

Simply stated, we are convinced that *Gideon's* requirement of court-appointed counsel cannot be limited to cases in which a "not guilty" plea has been entered—the context

in which *Gideon* itself was decided. Indeed, we would be less than candid were we even to consider the question as an original matter; even if *Gideon* may be said to have left the issue open, our conclusion seems plainly required by the Supreme Court's recent disposition of *Doughty* v. *Maxwell*, —— U. S. —— (32 U. S. L. Week 3297, February 25, 1964).

Doughty had been indicted for rape in 1958. Although "discussing" the possibility of securing counsel with his wife, he entered a plea of guilty in January of 1959, without ever requesting the assistance of an attorney. Sentenced to prison, he sought habeas corpus in the state courts of Ohio, alleging, *inter alia*, that his right to counsel had been infringed. In an opinion filed before *Gideon* was decided, the Supreme Court of Ohio rejected his petition, on the ground that Doughty had waived his right to counsel by pleading guilty. 173 Ohio St. 407, 183 N. E. 2d 368 (1962).

Doughty's petition for certiorari reached the Supreme Court after the decision in *Gideon*. In a brief *per curiam* opinion, the Court reversed and remanded the Ohio judgment for "further consideration in light of *Gideon* v. *Wainwright*." 372 U. S. 781 (1963). On remand, however, the Ohio Court adhered to its previous decision after concluding that *Gideon* was not dispositive because Doughty had failed to request the assistance of counsel. 175 Ohio St. 46, 191 N. E. 2d 727 (1963). It was this second Ohio decision, refusing to apply *Gideon* to a case in which the defendant pleaded guilty and did not request counsel, which the Supreme Court summarily reversed in a brief *per curiam* order, on the authority of *Gideon* and *Carnley* v. *Cochran*, 369 U. S. 506 (1961).

It is well established in federal prosecutions that the failure to advise a defendant of his right to counsel will invalidate a plea of guilty even in the absence of a showing of prejudice. *United States* v. *LaVallee*, 306 F. 2d 216 (2d Cir. 1962); cf. *United States* v. *Tribotti*, 297 F. 2d 598

(2d Cir. 1961) (counsel must be afforded not only at time of plea but at sentence as well). In light of the *Gideon* rationale and the precise ruling in *Doughty*, we feel constrained to hold that state convictions, when founded on a plea of guilty by a defendant unaware of his right to counsel, similarly cannot stand.

"Such a result is clearly in keeping with the spirit of *Gideon*. As expressed by the *Gideon* Court, 372 U. S. at 344-45, our country has long prized the notion of "impartial tribunals in which every defendant stands equal before the law. [But] [t]his noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him. A defendant's need for a lawyer is nowhere better stated than in the moving words of Mr. Justice Sutherland in *Powell* v. *Alabama*: 'The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with a crime, he is incapable, generally, of determining for himself whether the indictment is good or bad . . . He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step of the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.' 287 U. S. at 68-69."

While written with reference to a defendant's rights in a criminal trial, these words seem to carry no less force when applied to an uncounselled defendant compelled to plead unaided to criminal charges. Bewildered by the mystifying language in which legal documents are cast, he too will generally be incapable "of determining for himself whether the indictment is good or bad." Overwhelmed by the seemingly overpowering resources of the state, he may elect to plead guilty because he feels woefully ill-equipped

to prepare his defense, "even though he have a perfect one." Unlike the defendant financially able to retain an attorney, he may be unaware of legal defects and complexities in the charges against him, and plead guilty to an offense which he has not committed. Indeed, the appeals now before us furnish striking proof that this possibility is more than theoretical. Thus, for example, had Durocher been aided by counsel, he might have been advised that he had not technically "broken" into a private dwelling as charged in the complaint, or lacked the intent required by the relevant state statute, and hence had a good defense to the serious offense charged. *Cf. United States ex rel. Foreman* v. *Fay*, 184 F. Supp. 535 (S. D. N. Y. 1960).

Before *Gideon*, it may have been possible to argue that the more egregious cases of prejudice could be rectified if pleas of guilty were reviewed for "fundamental fairness." But it was precisely this sort of elusive and unsatisfactory inquiry into the possibility of prejudice which *Gideon* sought to inter once and for all. Indeed, the overruling of *Betts* by *Gideon* seems grounded on two fundamental assumptions: that a criminal defendant compelled to act without the advice of counsel will always be disadvantaged thereby, and that the precise degree of that disadvantage can never be satisfactorily measured by an after-the-fact search for prejudice. Since the considerations which impelled the *Gideon* Court to abandon the "fundamental fairness" test seem equally applicable to guilty pleas, there would seem no warrant for resurrecting a rule of law which has been so thoroughly discredited. For, if anything, the impossibility of determining just how much a defendant was injured by the absence of counsel is all the greater where guilty pleas are involved, since court records and transcripts will not contain all the detailed facts relevant to such a determination and ordinarily available in cases where there has been a trial.

Appendix A.

In *Hamilton v. Alabama*, 368 U. S. 52 (1961), a unanimous Supreme Court held that a state could not deny counsel to a defendant required to plead to capital charges. Citing *Hamilton*, Mr. Justice Clark explained in a concurring opinion to *Gideon* that the latter decision "does no more than erase a distinction which has no basis in logic and an increasingly eroded basis in authority," since "the Constitution makes no distinction between capital and non-capital cases." 372 U. S. 348-49. Similarly, Mr. Justice Harlan observed in his *Gideon* concurrence that the "special circumstances rule has been formally abandoned in capital cases, and the time has come when it should be similarly abandoned in non-capital cases . . ." *Id.* at 351. After *Hamilton*, a capital conviction could hardly be supported if a defendant were denied the assistance of counsel at a critical stage in the proceedings. Since the Constitution forbids the taking of life *and* liberty without due process of law, there seems no reason why a distinction which the Supreme Court has taken such pains to lay to rest should be perpetuated.

To return to the language of *Gideon*: "Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries." 372 U. S. at 344.

IV.

Well before *Doughty*, the Supreme Court had made it clear that a defendant otherwise entitled to the assistance

of counsel does not lose that right by his failure to request an attorney at the time of his conviction. In the words of Mr. Justice Brennan, writing for the Court in *Carnley v. Cochran*, 369 U. S. 506, 513 (1962), "it is settled that where the assistance of counsel is a constitutional requisite, the right to be furnished counsel does not depend on a request." Indeed, as early as 1945, the Supreme Court held in *Rice v. Olson*, 324 U. S. 786 (1945), that a plea of guilty cannot operate as a waiver of court-appointed counsel, and that the absence of a request therefor was totally irrelevant to a determination of whether counsel should have been appointed.

Especially as applied to *Gideon*, this doctrine clearly seems correct. If we were to hold that *Gideon* might not be invoked by those who did not request the assistance of counsel, we would be penalizing precisely those defendants whom *Gideon* was most intended to protect—those so ignorant of or unfamiliar with criminal procedures that they were not even sufficiently sophisticated to request court-appointed counsel. Since any request would presumably have been denied under *Betts*, we would at best be requiring that defendants perform a meaningless ritual in order to preserve vitally important constitutional rights. So to hold would make a mockery of the classic definition of waiver enunciated in *Johnson v. Zerbst*, 304 U. S. 458, 464 (1938), and recently reaffirmed in the context of a federal habeas corpus application by a state prisoner, *Fay v. Noia*, 372 U. S. 391, 439 (1963). Under this familiar standard, waiver may not be implied by the bare failure to act; rather, there must be "an intentional relinquishment or abandonment of a known right or privilege." Where, as here, petitioners allege that they were unaware of their right to counsel, that they were never so advised, and that, in fact, the Supreme Court did not recognize their right until after their convictions, a finding of waiver would border on the fanciful.

V.

We have thus concluded that the force of *Gideon* v. *Wainwright* is in no way lessened in these cases merely because the appellants pleaded guilty and failed to request the assistance of counsel. We are left with the question whether *Gideon* is to be retrospectively applied—whether it may be invoked by defendants whose convictions preceded that of Gideon himself.

After *Doughty*, which set aside a pre-*Gideon* conviction for lack of counsel, this question of retrospective application is no longer open to us. In a real sense, however, *Doughty* was inevitable: the fundamental nature of the right to counsel and its essential place in the very concept of a fair trial compelled such a holding. Before his death, Judge Clark prepared an opinion for the Court which traced, in reasoned and scholarly fashion, the compelling considerations which even before *Doughty* seemed to require a holding of retroactivity. We subscribe fully to his

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In determining whether a decision is to be retroactively applied, commentators have often suggested a test based on whether the underlying "purpose" of that decision would be served thereby. See, e.g., Comment, *Prospective Overruling and Retroactive Application in the Federal Courts*, 71 Yale L. J. 907 (1962). Under such an analysis, for example, a distinction might be drawn between *Gideon* and a case such as *Mapp* v. *Ohio*, 367 U. S. 643 (1961). It might be argued, in this regard, that the exclusionary rule of *Mapp* is not designed to protect the "fairness" of the actual trial, but rather to serve as a deterrent to oppressive police conduct. If this is true, it might be maintained that *Mapp* has less of a claim to retroactive application than does *Gideon*, since *Mapp* could hardly be expected to "deter" searches which took place prior to the date of its decision. See *United States ex rel. Linkletter* v. *Walker*, 323 F. 2d 11, 15 (5th Cir. 1963). It is not now necessary to express any view as to the validity of this sort of analysis, and we expressly disclaim any intention here to decide whether *Mapp* is to be retroactively applied. Considerations of this sort do, however, indicate that *Gideon* and *Mapp* present quite different questions, and that a holding that the former is retroactive by no means compels a similar result when the latter issue is before us.

conclusion, and we hence offer relevant portions of his opinion as the best possible exposition of the factors which seem to us, so decisive and which led inelucta bly to the summary disposition of *Doughty* in the Supreme Court's two-sentence *per curiam* memorandum.

"*First*. The principle announced in *Gideon* was applied retrospectively in that very case to grant relief to Clarence E. Gideon, convicted on August 4, 1961.[4] Thus we begin with the fact that the Court overruled *Betts* v. *Brady*, *supra*, 316 U. S. 455, characterized in *Gideon* as 'an anachronism when it was handed down,' in a habeas corpus case rather than in a case before it from a direct appeal, as it could easily have done had it intended the overruling to be prospective only.[5] Moreover, there is not the slightest hint in the decision that its application is to be restricted to prospective application . . . This silence is made even more meaningful by the fact that 22 states as *amici* had urged the Court to deny retrospective effect to the decision.

"*Second*. Subsequent to the decision the Court has remanded upwards of forty cases 'for further consideration in light of *Gideon* v. *Wainwright* * * *.' The summary disposition of these appeals is a clear, if inexplicit, indi-

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[4] If *Gideon* were applied prospectively only there would be no totally defensible cutoff point for retrospective application. Since Clarence E. Gideon was convicted on August 4, 1961, and was given relief, the decision must apply back to that date to insure equal protection of the laws. Logically, however, it could be argued that the decision must apply back to some point during the trial when Gideon was deprived of counsel—or perhaps even to his arrest. Do the rights of prisoners tried during the summer of 1961 depend on whether they were tried during, before, or after Gideon's trial—or his arrest—or his sentencing? Or perhaps the alleged date of the crime is critical. Against such casuistry we hasten to add our simple point: Constitutional rights should not depend on arcane logic or trivial events.

[5] As in *Patterson* v. *Warden, Md. Penitentiary*, 372 U. S. 776, decided April 22, 1963.

cation that *Gideon* is to be applied retroactively. See *United States ex rel. Craig* v. *Myers*, D. C. E. D. Pa., 220 F. Supp. 762, 763. This fact was highlighted by Justice Harlan's dissent in *Pickelsimer* v. *Wainwright*, 375 U. S. 2, 3, 84 S. Ct. 80, 81, where he stated: 'I am unable to agree with the Court's summary disposition of these 10 Florida cases, and believe that the federal question *which they present* in common is deserving of full-dress consideration. That question is whether the denial of an indigent defendant's right to court-appointed counsel in a state criminal trial as established last Term in *Gideon* v. *Wainwright*, 372 U. S. 335, overruling *Betts* v. *Brady*, 316 U. S. 455, invalidates his pre-*Gideon* conviction.' (Emphasis added.)

"*Third.* We are therefore constrained to hold it settled law that *Gideon* is to be applied retrospectively." Chief Judge Sobeloff put the case strongly when concurring in *Jones* v. *Cunningham*, 4 Cir., 319 F. 2d 1, 5, where the majority avoided the question of retroactivity by deciding

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That result is also assumed in the following precedents: *Lopez* v. *United States*, 373 U. S. 427, 445, where on a case involving a pre-*Gideon* trial, Warren, C. J., in concurring in the result, stated that a right to counsel might be involved, and cited *Gilette Spicker* v. *Pancher*, 6 Cir., 317 F. 2d 780, 783, where in a damage suit for deprivation of constitutional rights by a former prisoner against a sheriff the court stated "*Betts* v. *Brady* [316 U. S. 455, 62 S. Ct. 1252, 86 L. Ed. 1595 (1942)] has since been overruled, and the law as announced in the later case *Gideon* v. *Wainwright*, 372 U. S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963)] must be viewed as the law in the prior period"; *Nolan* v. *Nash*, 8 Cir., 316 F. 2d 779, 777, where the court apparently applied *Gideon* standards in an appeal from a denial of habeas corpus challenging a 1942 conviction; *People* v. *Callahan*, 10 N. Y. 2d 383, 240 N. Y. S. 2d 460, applying *Gideon* standards to a 1942 nonmentoring procedure; and *Tiff* v. *Cochran*, Fla., 154 So. 2d 857, one of the numerous Florida cases vacated and remanded for reconsideration in light of *Gideon*. The Florida supreme court is apparently uniformly applying *Gideon* retroactively. See *Gideon* v. *Wainwright*, Fla., 153 So. 2d 299 (on remand).

that the relator was entitled to relief even under the *Betts* rule: 'I would prefer that the court face the question whether the teaching of *Gideon* v. *Wainwright* should be applied here. I have no doubt that it should. * * * Once it is acknowledged that a conviction under review was obtained in violation of the constitutional right to counsel, a new trial should be awarded and it should make no difference whether the violation occurred before or after the *Gideon* decision. The fact that the defendant spent a number of years in prison under a fatally void conviction is no reason to continue to deny him his rights at a new and constitutional trial, irrespective of the presence or absence of special circumstances. This is made especially clear by the Supreme Court's recognition that the more restrictive decision in *Betts* v. *Brady* was 'an abrupt break with its own well-considered precedents' (372 U. S. at 344, 83 S. Ct. at 796-797, 9 L. Ed. 2d 799).' See also *United States ex rel. Craig* v. *Myers, supra*, D. C. E. D. Pa., 220 F. Supp. 762. Thus it is significant that no court save one has held *Gideon* prospective only, and that in the one the holding was without visible reasoning or support. *Commonwealth of Pennsylvania ex rel. Craig* v. *Banmiller*, 410 Pa. 584, 189 A. 2d 875. But see *United States ex rel. Craig* v. *Myers, supra*, D. C. E. D. Pa., 220 F. Supp. 762; *Jones* v. *Cunningham, supra*, 4 Cir., 319 F. 2d 1.

"*Fourth.* But were we to conclude that the Court had left the question of *Gideon*'s retroactive application an open one, we would nevertheless believe it necessary to hold it retrospective." Of course, we are past the splendid myth of 'discovered law.' 1 Blackstone, Commentaries 70, which once would have foreclosed discussion of the question. See *Griffin* v. *Illinois*, 351 U. S. 12, 26 (Frankfurter,

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In *Otten* v. *Warden, Baltimore City Jail*, D. C. Md., 216 F. Supp. 289, the question of *Gideon*'s retroactivity was listed as an open one

J., concurring); *Chicot County Drainage Dist.* v. *Baxter State Bank*, 308 U. S. 371, 374; *Great Northern R. Co.* v. *Sunburst Oil & Refining Co.*, 287 U. S. 358, 363-366, 85 A. L. R. 254; Address of Chief Judge Cardozo, 55 N. Y. St. Bar Ass'n Rep. 263, 294 *et seq.* (1932), reprinted in Hall, *Selected Writings of Benjamin Nathan Cardozo* 7, 33 (1947); Comment, *Prospective Overruling and Retroactive Application in the Federal Courts*, 71 Yale L. J. 907 (1962). *But cf. James* v. *United States*, 366 U. S. 213, 247 (Harlan, *J.*, concurring in part and dissenting in part); *Hall* v. *Warden, Md. Penitentiary*, 4 Cir., 313 F. 2d 483. We do not deal here, however, with considerations of *res judicata* and vested rights, but with the question whether, consonant with our society's conceptions of due process and general constitutional law, we could deny the constitutional right enunciated in *Gideon* to those who happened to be tried before the decision was handed down. Thus to hold would be to assign a lower constitutional status to pre-*Gideon* prisoners who were denied the right to counsel, a right so 'fundamental and essential to a fair trial' that it is made obligatory upon the States by the Fourteenth Amendment to the United States Constitution; a right that has been characterized by the Court as a 'basic minimal' right vouchsafed by the Constitution. *Rivera* v. *Louisiana*, 373 U. S. 723, 726. There is no question that such prisoners were subjected to an unfair trial. The only question is whether we will deny them relief. We do not believe that our constitutional standards would permit such a denial."

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[*] See *Ex parte Siebold*, 100 U. S. 371, 377; see also Note, *Prospective Operation of Decisions Holding Statutes Unconstitutional or Overruling Prior Decisions*, 60 Harv. L. Rev. 437, 446 (1947); cf. *James* v. *United States*, 366 U. S. 213, 224 (Black, *J.*, concurring in part and dissenting in part).

Appendix A.

VI.

In following *Doughty* and concluding that *Gideon* must be retrospectively applied, we are not unmindful of nor unconcerned with the practical difficulties engendered by such a decision, and the great burden which it will place upon the District Judges. It is likely that the number of state prisoners able to avail themselves of *Gideon* will far exceed the number of federal offenders, convicted without counsel, who spurred the "avalanche" of petitions which followed *Johnson* v. *Zerbst*, 304 U. S. 458 (1938), and its holding that the failure to provide counsel in federal prosecutions could furnish the basis for post-conviction collateral relief. While *Johnson* applied only to federal prisoners, *Gideon* affects prisoners convicted under many state criminal systems.

It is also likely that the state prisoners benefited by *Gideon* will include far more serious offenders than the federal prisoners affected by *Johnson* v. *Zerbst*. Not only do the state courts, by and large, deal with the more serious offenders, but state sentences are notoriously longer than federal sentences, and hence more petitions will be forthcoming. Indeed, those prisoners who have committed the more serious crimes and who are thus serving the longer sentences may be the primary beneficiaries of our ruling. Because they have been incarcerated for a longer period and in view of the fact that more time has thus elapsed since the commission of their crime, it will be the hardest to retry precisely those offenders who, in the interests of an ordered society, should least be permitted to remain at large.

Finally, the District Courts may find it difficult to determine whether those tried in the remote past were indeed denied the assistance of counsel. Records may be stale, incomplete, or missing, and it may hence be difficult ac-

curately to reconstruct events at prosecutions long ago and far away.

These prospects are deeply disturbing. Here, however, the fundamental nature of the right protected by *Gideon* v. *Wainwright* and the injustice attendant upon the continued imprisonment of those defendans who have been denied representation by counsel at an important stage of a criminal prosecution, have precluded the limitation of *Gideon* to prospective application. As the Supreme Court recognized in Gideon and as Judge Clark was careful to make clear, "under our Constitution, fair trial is not a luxury, but a necessity."

VII.

We have thus concluded that the decisions before us must be reversed, and the cases remanded for further proceedings. We believe, in sum, that the principles which underlie *Gideon* v. *Wainwright* may not logically be restricted either to cases involving "not guilty" pleas nor to those which postdated *Gideon*. The disposition of Ripple's case has already been considered; a brief word is in order with respect to the remaining appellants.

Although Durocher and Brown have both been afforded a hearing, the inquiry in both cases was directed to whether the "special circumstances" required under *Betts* had been sufficiently established. Since *Gideon* has eliminated the necessity of such a showing, we believe that both are entitled to a new hearing under *Gideon*. Moore's petition was denied on the papers submitted: under our view of the effect of *Gideon*, his petition is now clearly sufficient to require a hearing.

On remand, the District Courts will, of course, hardly be compelled to accept the petitioners' allegations as true. *Gideon* has changed a rule of law, but it has not abrogated the traditional responsibility of the District Courts ac-

curately to determine the factual patterns upon which that law is to be applied. While issues of "fundamental fairness" have been removed from their consideration, the District Courts will now be confronted with factual determinations as to whether each appellant was, in fact, advised of his right to counsel, whether he waived that right, and if not, and if indigent, whether he was afforded court-appointed counsel. In resolving such questions, there is no reason to suppose that the Courts will not employ the methods and techniques which have long been familiar to our judicial system. Thus, they will undoubtedly consider the appellant's credibility; available court records; the prevailing practices of a particular state; any evidence which the State might choose to offer; and all other relevant considerations. In short, though on occasion difficult, there is no reason to believe that the determinations required by *Gideon* will be any more incapable of resolution than those required by *Betts*, and, indeed, the elimination of the search for "fundamental fairness" would indicate that the task of the District Courts has been greatly simplified. No more than before will the Courts be required to treat bare allegations of the denial of constitutional rights as tantamount to conclusive proof that these rights were, in fact, denied.

It is appropriate that we conclude with these words from *Gideon* v. *Wainwright*: "reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." 372 U. S. at 344. This principle is no less valid in the cases before us than it was in *Gideon* itself.

Reversed and remanded for hearings in accordance with this opinion.

FRIENDLY, *Circuit Judge* (concurring):

If I could regard the issue as still open, I should have supposed there might be a substantial distinction between a state's forcing an accused who asserts his innocence of a serious crime to defend himself without the assistance of counsel, as in *Gideon* v. *Wainwright*, 372 U. S. 335 (1963), a practice which, in Mr. Justice Cardozo's great words, is "repugnant to the conscience of mankind" and violative "of a scheme of ordered liberty," *Palko* v. *Connecticut*, 302 U. S. 319, 323, 325 (1963), and accepting a plea of guilty from a man, often with many previous brushes with the criminal law, caught in the commission of a garden variety offense or with the means or fruits of its commission upon him. I should have found it hard to believe that due process of law invariably required a state to make certain that such a man had deliberately foregone the aid of counsel before he elected to plead guilty to the charge rather than stand a trial which he knew neither could nor should be won. Even if this should be the rule for the future, the case against its application to guilty pleas of long ago would have seemed formidable, since, as experience tells us, the vast majority of prisoners who would thus be turned loose on society because of the loss of evidence once available (or, as here, because the attack is on a sentence already served and now used as a basis for further punishment) could not have benefited from the aid now asserted to have been unconstitutionally withheld; due process would have seemed to me to require some weighing of the interest of the ordinary law abiding citizen against the rare case of the prisoner who might have successfully maintained a not guilty plea if properly advised. I should therefore have voted to affirm the orders here made after hearing with respect to Durocher and Brown and to remand for a hearing to determine whether fundamental fairness was violated by the acceptance of Moore's

plea, while joining in the majority's disposition of Ripple's very different case.

However, the two sentence *per curiam decision in Doughty* v. *Maxwell*, —— U. S. —— (1964), dealing with a guilty plea four years prior to the *Gideon* decision, proves to me that the Supreme Court does not regard the distinction I would have thought significant as even warranting discussion. Although I would like to be able to construe the decision as limited to guilty pleas of relatively recent vintage, as Chief Judge Lumbard does, I cannot believe that if this was all the court meant, it would not have said so. Because of the authority of that decision, I join in the judgment here.

LUMBARD, *Chief Judge* (with whom Judge Moore concurs), dissenting:

While I agree with Judge Kaufman that *Gideon* v. *Wainwright* requires that defendants in state felony proceedings be advised of their right to counsel whether they plead guilty or stand trial, I cannot agree that that principle must or should be applied now to the pleas of guilty entered by Ripple in 1931, by Moore in 1943, by Durocher in 1950, and by Brown in 1954.

By its action in *Doughty*, the Supreme Court did look back to 1959. But the Court gave no reasons in support of its summary 22-word reversal. Until the Court specifically invalidates pleas of guilty entered prior to 1959, it seems to me that we should not look backwards to any earlier year. There are compelling reasons why we should not subject the states to the hazards of reprosecuting cases where the events in question are more than five years old.

Gideon clearly establishes that states must now provide counsel to indigent defendants faced with felony charges

unless such defendants knowingly waive their right to counsel. Failure to provide counsel, in the absence of such a waiver, will invalidate any conviction. Thus *Gideon* will have served its primary purpose in assuring indigent defendants the aid of counsel from this time henceforth.

What then do the federal courts accomplish if they choose to apply *Gideon* retroactively without limit of time? Until the *Gideon* decision of March 18, 1963, the states operated under the rule of *Betts* v. *Brady*, 316 U. S. 455 (1942), that state convictions in non-capital cases were invulnerable to attack on the ground that the defendant had not been represented by counsel unless he could establish that lack of counsel had resulted in fundamental unfairness.

While to many of us the continued failure of the states to provide counsel to the indigent defendant in felony cases seemed a black chapter in the history of American law[1]—and as time goes by will seem even more inexplicable—there were [illegible] reasonable men who thought that the states were doing substantial justice and, in any event, that the federal courts should intervene only upon a positive showing that the defendant had been unfairly treated.

The wonder is that *Gideon* did not come sooner. The question must have been raised in scores of the many hundred *pro se* applications from state prisoners which deluged the Supreme Court and other federal courts in the years prior to March 1963. By 1963 there were in the prisons of most of the fifty states thousands of defendants who had pleaded guilty without offer of counsel and without benefit of counsel.

But the fact that some change in the law was necessary and indeed long overdue does not justify in itself the unlimited retroactive application of that change when finally

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[1] The writer expressed this opinion in 1952. 37 Cornell Law Quarterly 555.

effected. Throughout this country considerably more than 85 per cent of those accused of serious crimes plead guilty whether or not represented by counsel. Thus, there can be no doubt that state prisoners serving sentences imposed after pleas of guilty did, in fact, commit the crimes for which they are now imprisoned as they have admitted this by their plea of guilty. The petitions of Ripple, Moore, Durocher, and Brown make it crystal clear that they had in fact committed the acts as charged in the indictment to which they pleaded guilty. While counsel might have advised or negotiated some mitigation of plea or sentence, an overwhelming percentage of unrepresented indigent defendants would have borne the stigma of conviction in any event; assistance of counsel could have resulted at best in only a very small percentage of acquittals or dismissals.

Unlimited retroactive application of *Gideon* would thus compel the release of thousands of felons who can no longer be tried because witnesses and evidence are no longer available. Indeed it is the more hardened criminals who profit most by unlimited retroactivity, for they are still serving lengthy sentences imposed long ago at a time when the states could properly assume that fundamental fairness was the applicable test. As to the overwhelming majority of such prisoners there can be no doubt that they received substantially fair treatment. The majority opinion would not only let them out of jail but it would permit them to have the slate wiped clean by reason of the passage of time which renders the state unable now to prove its case. To require the release of thousands of state prisoners who undoubtedly are guilty of crimes serious enough to justify long terms of imprisonment strikes a severe blow to enforcement of law and the administration of criminal justice.

On the other hand, were we to limit the retroactive effect of *Gideon* and *Doughty* to the period of time necessarily comprehended in those cases, the states might still prose-

cute most of such defendants and bring them to trial if new pleas of guilty were not forthcoming. Fortunately, or not, the Supreme Court has chosen to act in cases where the criminal charges are relatively recent in point of time, much more so than in the cases before us. Gideon was tried in 1961 on charges that he had committed an offense earlier that same year. The state did in fact retry him, albeit unsuccessfully. The charge against Doughty was for rape allegedly committed in 1958, and his plea of guilty was entered in 1959.

We do not know whether the Supreme Court thus meant to leave open the question of retrospective application to convictions prior to 1959. While we must now go as far as that Court went, so that other defendants who were unrepresented as were Gideon and Doughty are not denied the equal protection of those decisions, it seems to me that retrospective effect prior to 1959 is fraught with so many unfavorable consequences which far outweigh the little good which might possibly flow from such action that I would do no more than what the Supreme Court has already chosen to do in these two cases.

We have been admonished many times that federal courts ought not to interfere with the administration of criminal justice by the states. Mr. Justice Harlan, writing for a majority of the Supreme Court, said in *Haag v. New Jersey*, 356 U. S. 464 at 468 (1958): "For it has long been recognized as the very essence of our federalism that the States should have the widest latitude in the administration of their own systems of criminal justice." See also *Twining v. New Jersey*, 211 U. S. 78 (1908). Surely any federal court of less stature than the Supreme Court ought not go one step further than is necessary to carry out the plain and expressed mandate of that Court where to do so will certainly amount to a wholesale jail delivery from many state prisons in this country. At the very least it

would seem that the Court has left open the question of how far it will go into the past to give retrospective effect to *Gideon* and *Doughty*. See Justice Harlan's dissent in *Pickelsimer* v. *Wainwright*, 375 U. S. 2, 3 (1963). And no one would doubt the power of the Court to say how far back into the past a newly made rule, even one declaring constitutional rights, must be applied. See *Griffin* v. *Illinois*, 351 U. S. 12, 25-26 (1956) (Frankfurter, J., concurring); Bender, Retroactive Effect of an Overruling Constitutional Decision: *Mapp* v. *Ohio*, 110 U. Pa. L. Rev. 650 (1962); Traynor, *Mapp* v. *Ohio* at large in the Fifty States, 1962 Duke L. J. 319, 338-42; Note, Prospective Overruling and Retroactive Application in the Federal Courts, 71 Yale L. J. 907, 909-33 (1962); Snyder, Retrospective Operation of Overruling Decisions, 35 Ill. L. Rev. 121 (1940).

For the above reasons I would affirm the orders of the district court in all four cases.

Appendix B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES *ex rel.* RAYMOND DUBOCHER,

Relator-Appellant,

v.

J. E. LAVALLEE, Warden, Clinton Prison,
Dannemora, New York,

Respondent-Appellee.

UNITED STATES *ex rel.* JAMES JESSE BROWN,

Relator-Appellant,

v.

ROBERT E. MURPHY, Warden, Auburn Prison,
Auburn, New York,

Respondent-Appellee.

UNITED STATES *ex rel.* WILLIAM MOORE,

Relator-Appellant,

v.

ROBERT E. MURPHY, Warden, Auburn Prison,
Auburn, New York,

Respondent-Appellee.

Appendix B.

MOTION TO STAY ISSUANCE OF MANDATE PENDING APPLICATION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

Louis J. Lefkowitz, Attorney General of the State of New York, New York, N. Y. for respondents-appellees.

All the judges concurring, the motion to stay the mandate in these cases is granted on the terms and conditions provided in our Rule 28(c).

J. EDWARD LUMBARD
Chief Judge

15 April 1964.